



Abdullahi v Independent Electoral and Boundaries Commission & 3 others (Election Petition Appeal E004 of 2022) [2023] KECA 207 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KECA 207 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
ELECTION PETITION APPEAL E004 OF 2022
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 24, 2023**

BETWEEN

SIYAD ABDILLE ABDULLAHI APPELLANT

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**CONSTITUENCY RETURNING OFFICER, ELDAS CONSTITUENCY 2ND
RESPONDENT**

**ANTHONY NJOROGE DOUGLAS, COUNTY RETURNING
OFFICER 3RD RESPONDENT**

ABDULLAHI MOHAMED 4TH RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Garissa
(Dulu, J.) delivered on 2nd November 2022 in Election Petition No. E006 of 2022)*

JUDGMENT

1. Universal suffrage in a democratic society, such as Kenya, guarantees citizens the freedom to exercise their political rights to elect any qualified person into any elective office established under the [Constitution](#).
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2. On Tuesday, August 9, 2022, the residents of Wajir County went to the ballot to elect their political representatives at various levels of government. The appellant and the 4th respondent herein had



- presented themselves as candidates for election to the office of governor, Wajir County, in the election that was conducted by the 1st respondent.
3. The 4th respondent was declared by the 1st respondent as the validly elected Governor of Wajir County, having garnered a total of 35,533 votes. The declaration was subsequently followed by gazettelement of the 4th respondent as the governor elect, Wajir County.
 4. Dissatisfied with the outcome of the gubernatorial election, the appellant filed an election petition in the High Court at Garissa, to wit, Election Petition No E006 of 2022, dated September 8, 2022, seeking primarily nullification of the 4th respondent's election as the Governor of Wajir County. The basis of the petition was, inter alia, that the 1st, 2nd and 3rd respondents failed to comply with the Constitution and electoral laws when conducting the election; and that the electoral malpractices, anomalies and/or non-compliance with electoral laws substantially affected the results of the elections for Governor, Wajir County.
 5. During the pendency of the petition, the 4th respondent filed an application by way of a notice of motion dated September 26, 2022, seeking to strike out the appellant's petition and the supporting affidavit; and consequent to the striking out, the proceedings be terminated with costs to the 4th respondent.
 6. The grounds in support of the application were that the appellant had violated certain provisions of the Elections Act, 2011 and the Elections (Parliamentary and County) Petition Rules, 2017, by, inter alia, failing to join the deputy governor who was a necessary party in the petition. The appellant was also said to have joined a wrong party to the petition. It was stated that the 3rd respondent, Anthony Njoroge Douglas, had been gazetted by the 1st respondent as the county returning officer, Nyamira County. He therefore did not have any nexus to the Wajir gubernatorial election. It was further stated that, in prayer C of his petition, the appellant sought a declaratory order to the effect that one George Koimburu Ndung'u was not validly elected as the Governor, Wajir County. The said George Koimburu Ndung'u was said to be the validly elected Member of the National Assembly, Juja Constituency. His nexus (if any) to the petition before court was also challenged. The appellant was also said to have made allegations of a criminal nature against the wrongly joined 3rd respondent; that paragraphs 91 to 93 of the appellant's supporting affidavit contained statements which amounted to hearsay as the paragraphs contained information from undisclosed sources, and from Facebook accounts.
 7. The 1st respondent, in its reply to the petition, stated that the same was fatally defective as the appellant did not comply with the provisions of rule 8(1) (a), (c), (d) and (f) as well as rule 12(2) (c) of the Elections (Parliamentary and County) Petition Rules, 2017, for failing to indicate the results of the election being challenged, the manner and date on which the results were declared, the number of votes cast in favour of each candidate, and the total number of votes cast in contravention of the election laws; and that the failure to join the deputy governor as a party violated election laws and was contrary to the right to fair hearing under article 50 of the Constitution.
 8. In response to the application, the appellant swore an affidavit in which he denied any violation of the Elections Act, 2011 and the Elections (Parliamentary and County) Petition Rules, 2017. He denied mis-joinder or non-joinder of parties as alleged; he contended that the 3rd respondent was the county returning officer and the mere appearance of the name of the county returning officer of Nyamira County was immaterial as what was being challenged was the gubernatorial election of Wajir County; that the governor, being the person whose election was complained of, it was not necessary to join the deputy governor as a party. The appellant denied that any relief had been sought against George Koimburu Ndung'u in prayer C of its petition as alleged.



9. The High Court, in its ruling dated November 2, 2022, made the following key findings:
- a. The name, Anthony Njoroge Douglas, said to belong to the 3rd respondent, was a result of careless copy pasting which would not cause any prejudice on party or make the petition fatally defective, as the 3rd respondent was actually the county returning officer for Wajir and the said county returning officer filed an affidavit.
 - b. The petition could not be fatally defective merely because of an allegation that three paragraphs of the supporting affidavit contained hearsay evidence.
 - c. The alleged defective relief in the petition at prayer C allegedly listing George Koimhuri Ndung'u as the person against whom a declaration sought to issue did not exist in the petition on record.
 - d. The Constitution conjoins the governor and deputy governor in such a way that removal of the governor by way of an election petition will mean removal of the deputy.
 - e. As a person who will be affected by the outcome of the petition, the deputy governor must be joined in an election petition filed against the governor. The petition was therefore fatally defective for not joining the deputy governor as a respondent.
 - f. Rule 8 (1) (c) of the Election Petition Rules envisaged that the votes garnered by all candidates who contested the disputed elections should be pleaded in the petition. There was no pleading on record to show who was contesting against the 4th respondent and what each garnered.
 - g. Failure to plead the full results was a fatal defect to the petition and the petition could not stand on that account.
10. The court allowed the 4th respondent's application dated September 26, 2022 and proceeded to strike out the petition by the appellant with costs to the 1st and 4th respondents.
11. Dissatisfied with the decision of the High Court, the appellant has lodged this appeal. Vide a memorandum of appeal dated December 2, 2022 and which was filed in Court on December 5, 2022, the appellant states that the learned judge erred in law and in fact: in holding that failure to join a deputy governor in an election petition renders the petition fatally defective; in holding that the appellant had not complied with section 8 (1) (c) of the Elections (Parliamentary and County) Petition Rules, 2017, which requires a petitioner to state the declared results of the election; in holding that failure to quote the quantitative results of the disputed election in the petition renders the petition fatally defective; and in making a determination on the issue of alleged non-compliance with section 8 (1)(c) of the Elections (Parliamentary and County) Petition Rules, 2017, an issue that was not raised in the grounds of the 4th respondent's application.
12. At the hearing of this appeal, learned counsel, Ms Awuor, held brief for Mr Kariuki for the appellant. Learned counsel, Mr Onderi, held brief for Mr Omwanza for the 4th respondent, and for Mr Nura for the 1st to 3rd respondents. Highlighting the appellant's written submissions dated January 31, 2023, Ms Awuor conceded that the appeal was filed outside the 30 days' period as required under section 85A of the Elections Act, 2011. Counsel contended that even though the appeal had been filed out of time, the preliminary objection challenging the competence of the appeal had also not been filed within the timeline prescribed under rule 19 of the Court of Appeal (Election Petition) Rules, 2017. The submission by counsel, therefore, was that the notice of preliminary objection was incompetent and ought to be struck out. She urged the court not to dismiss the appeal on a technicality, but instead exercise its discretion to enlarge time and determine the appeal on its merits.



13. On the issue of joinder or non-joinder of the deputy governor, the appellant's counsel submitted that a deputy governor is not one of the respondents contemplated under the provisions of rule 2 of the Elections (Parliamentary and County) Petition Rules, 2017. It was submitted that a deputy governor is not a mandatory party in an election petition, and that, therefore, failure to join the deputy governor ought not to be fatal to the petition. The decision by Mboghli, J (as he then was) in [*Japhet Muroko & Another vs Independent Electoral and Boundaries Commission \(IEBC\) & 2 Others \[2017\] eKLR*](#) was cited in support of this proposition.
14. As to whether the learned judge made a determination on the issue of the appellant's non-compliance with the provisions of rule 8 (1) (c), an issue not raised in the application by the 4th respondent, it was submitted that parties are bound by their pleadings, and that a court of law does not have power to determine issues not raised by parties in their pleadings or issues, which parties by consent have allowed the court to determine. That was the holding in [*Ndichu & Another vs Muriungi \(Civil Appeal 3 of 2020\) \[2022\] KEHC 2 \(KLR\) \(21 January 2022\)*](#) where Mativo, J (as he then was), cited with approval the decision of the court in [*MNM vs DNMK & 13 Others \[2017\] eKLR*](#) on that very issue.
15. As to whether the appellant failed to state the declared results of the election, it was contended that the appellant did in fact state the declared results at paragraph 9 of the petition and at paragraph 10 of the supporting affidavit, which made reference to Gazette Notice No 9949 which contained the declared results for Wajir County. On a related issue of whether failure to quote the quantitative results of the disputed election in the election petition renders it fatally defective, the appellant cited the cases of [*Silverse Lisamula Anami & Another vs Independent Electoral and Boundaries Commission & 2 Others \[2018\] eKLR*](#) and [*Mohamed Dado Hatu vs Dhadho Gaddae Godhana, Returning Officer, Tana River County & Independent Electoral and Boundaries Commission \[2017\] eKLR*](#), where the courts were said to have held that failure to state the results of the election in a petition was not a serious defect that could automatically lead to the petition being struck out. It was submitted that the court has a duty to hear the parties, and that it was not in the interest of justice for a party to be driven away from the seat of justice unheard on the basis of non-compliance with procedural rules.
16. Mr Onderi on behalf of the 1st to 3rd respondents indicated that the respondents would be relying entirely on their written submissions which are dated January 30, 2023. However, counsel made brief oral highlights on the issue of the competence of the appeal, which he urged us to strike out because it was filed out of time, in contravention of a statutory time limit.
17. In their written submissions, the 1st to 3rd respondents argue that the appeal is incompetent, having been filed outside the 30 days' period stipulated under section 85A of the [*Elections Act*](#), 2011. They further stated that timely resolution of electoral disputes has a constitutional underpinning in article 87 of the [*Constitution*](#). It is contended that the appeal is also incompetent because of the appellant's failure to file and serve the notice of appeal within the stipulated timeline, which is not a procedural technicality as the question of timelines goes to the jurisdiction of this court to hear and determine the appeal. The decision by the Supreme Court in [*Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others \[2014\] eKLR*](#) was cited in support of that submission.
18. On the issue of the appellant's failure to comply with the provisions of rule 8 (1) (a), (c), (d) and (f) of the Elections (Parliamentary and County) Petition Rules, 2017, it is submitted that it is mandatory to plead results of an election. The decisions of the High Court in [*Amina Hassan Ahmed vs Returning Officer, Mandera County & 2 Others \[2013\] eKLR*](#), and [*Evans Nyambaso Zedekiah & Another vs Independent Electoral and Boundaries Commission & 2 Others \[2013\] eKLR*](#) were cited to buttress that position.



19. Highlighting the written submissions of the 4th respondent, Mr Onderi stated that, even though his client's notice of preliminary objection had not been filed within 7 days of service of the appeal as required under rule 19 of the Court of Appeal (Election Petition) Rules, 2017, this court could, pursuant to the provisions of rule 17 of the said rules, extend the time for filing such an application. However, that discretion cannot be invoked to extend the time for filing of the appeal, that being a statutory requirement. The appellants cited this court's decisions in [Jeremiah Nyangwara Matoke vs Independent Electoral and Boundaries Commission \(IEBC\) & 2 Others \[2018\] eKLR](#) and [Wavinya Ndeti vs IEBC & 4 Others \[2014\] eKLR](#). He also relied on several decisions of the Supreme Court, among them, [Gatirau Peter Munya vs Dickson Mwenda Kitbinji & 3 Others SC Petition No 2B of 2014](#) and [Martha Wangari Karua vs Independent Electoral and Boundaries Commission & 3 Others \[2019\] eKLR](#). We were urged to find that the appeal is incompetent, having been filed late, and that, therefore, we have no jurisdiction to hear it.
20. On the issue of non-joinder of the deputy governor, it was submitted that deputy governors are necessary parties in an election petition and that they must be named as respondents. The 4th respondent relied on the decisions of [Mwamlole Tchappu Mbwana vs Independent Electoral & Boundaries Commission & 4 Others \[2017\] eKLR](#) and [Samwel Kazungu Kambi vs Nelly Ilongo, County Returning Officer, Kilifi County & 2 Others \[2018\] eKLR](#).
21. Regarding the failure by the appellant to plead the results of the election in the petition and in the supporting affidavit, it was contended that the provisions of rules 8 (1)(c) and 12 (2)(c) are mandatory in nature, and that failure to observe them would occasion the striking out of a petition as being fatally defective. Several decisions including [Omari Juma Mwakamole vs Independent Electoral & Boundaries Commission & 3 Others \[2017\] eKLR](#), [John Michael Njenga Mututbo vs Jayne Njeri Wanjiku Kihara & 2 Others \[2008\] eKLR](#) and [Mbaraka Issa Kombe vs Independent Electoral and Boundaries Commission \(IEBC\) & 2 Others \[2018\] eKLR](#) were cited in support of that submission.
22. Pursuant to the provisions of section 85A (1) of the [Elections Act](#), 2011, this court has appellate jurisdiction over decisions of the High Court concerning membership of the National Assembly, Senate or the Office of County Governor. Such jurisdiction is limited to 'matters of law only.' On what constitutes a matter of law, the Supreme Court in [Fredrick Otieno Outa vs Jared Okello & Others \[2014\] eKLR](#) observed thus:

' A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts or when the issue does not call for an examination of the probative value of the evidence presented, to truth or falsehood of facts being admitted.'
23. Although the appellant raised various issues for our determination, the appeal turns on the question of its competence. It matters not that the preliminary objection was not filed within seven (7) days of service of the appeal as required under rule 19. The objection touches on the jurisdiction of the court to hear and determine the appeal on its merits. Such an objection can be raised at any stage of the proceedings, even by the court on its own motion. See [Attorney General & 2 Others vs Okiya Omtata Okoiti & 14 Others \[2020\] eKLR](#). The 1st to 4th respondents submitted that the appeal was filed out of time and that, therefore, this court has no jurisdiction to hear and determine it on its merits. The appellant does not dispute that the appeal was filed three days outside the statutory period but urges us to exercise our discretion and enlarge the time so that we can assume jurisdiction and determine the appeal on its merits.



24. Courts of law in a plethora of decisions have held that jurisdiction is what empowers a court to determine a matter on its merits; that, without jurisdiction, a court's finding is null and void. In the celebrated decision of this court in, *Owners of the Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd [1989] KLR 1*, Nyarangi, JA held as follows:

' Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

25. In *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR*, the Supreme Court held that:

' A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law.'

26. The challenge on the competence of the appeal as earlier alluded to is premised on the provisions of section 85A of the *Elections Act*, 2011. The section provides in part as follows:

' 85A. Appeals to the Court of Appeal

1. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of County Governor shall lie to the Court of Appeal on matters of law only shall be –
 - a. filed within thirty days of the decision of the High Court; and
 - b. heard and determined within six months of the filing of the appeal.' [Emphasis added]

27. The petition culminating in the impugned decision related to the election of the County Governor, Wajir County. The impugned decision was delivered on November 2, 2022. It was conceded by the appellant's counsel that the appeal was filed on December 5, 2022. Pursuant to the provisions of section 85A (1)(a) of the *Elections Act*, 2011, the appeal ought to have been filed before this court on or before December 2, 2022. The appeal was therefore filed some 3 days outside the timeline prescribed under section 85A (1)(a) of the *Elections Act*, 2011. The question that we must answer is whether, pursuant to the provisions of rule 17 of the Court of Appeal (Election Petition) Rules, 2017, this court can extend the timelines within which the appellant ought to have filed his appeal. The answer to this question is, in our view, provided for under the provisions of rule 17 (2) of the Court of Appeal (Election Petition) Rules, 2017. Whereas the court has discretion to extend or reduce time in respect of timelines that are prescribed under the said rules, that discretion does not apply to timelines set by the Constitution and the *Elections Act*, 2011.

28. The import of the provisions of section 85A of the *Elections Act*, 20011 has been the subject of various court decisions. In *Wavinya vs IEBC & 4 Others [2014] eKLR*, this Court pronounced itself as follows:

' The question whether the court has discretion to entertain any appeal filed out of time depends on whether the provisions of section 85A are mandatory or discretionary. The same



language in section 85A is used in section 75 (4) of the Act in relation to appeals from the resident magistrates' court to the High court. Section 85 (A) deals with substantive and not procedural law. It confers both a right of appeal and jurisdiction to the Court of Appeal. There cannot be any doubt from the language and tenor of section 85A that parliament intended the provisions to be mandatory. The court has not been given power to extend time.' [Emphasis added]

29. On the general question of timelines in election petitions, the Supreme Court observed as follows in the case of *Lemanken Aramat vs Harun Meitamei Lempaka & 2 Others [2014] eKLR*:

' Those who filed election petitions outside the 28- day requirement of the *Constitution* cannot, in our perception, avoid the consequence of their dilatoriness; for it is the prescribed timeframe that opens the jurisdiction of the courts. And this being such an elemental constitutional requirement, it stands out by itself, irrespective of the averments made by parties in their pleadings. To this question, the general discretion provided for in article 159 would not apply, as this is not an ordinary issue of procedural compliance.'

30. Further, in *Evans Odbiambo Kidero & 4 Others vs Ferdinand Ndung'u Waititu & 4 Others [2014] eKLR*, the Supreme Court in addressing the issue of failure to meet the timeline for filing the appeal stated as follows:

' Consequently, and in view of our appraisal of the law, we hold that the learned judges of appeal erred in law by admitting, and determining an incompetent appeal, the same having been filed out of the time prescribed by the peremptory provisions of section 85A (a) of the *Elections Act* as read with article 87(1) of the *Constitution*. In so doing, the Court of Appeal acted without jurisdiction. In the circumstances, the majority judgment annulling the election of the first appellant herein is a nullity for all purposes.' [Emphasis added]

31. It is clear to us beyond any peradventure that an appeal from the High Court to this court in an election petition must be filed within thirty (30) days as stipulated by section 85A (1)(a) of the *Elections Act*, 2011. This provision accords with article 87 of the *Constitution* which provides for the timely settling of electoral disputes. The provisions section 85A (1)(a) of the *Elections Act*, 2011 are cast in stone and there is no wriggle room for the consideration of the question of enlargement of time.

32. Consequently, the appeal having been filed outside the 30 days' period as prescribed under section 85A of the *Elections Act*, 2011, this court is bereft of any jurisdiction to consider the merits of the appeal. We must therefore down our tools, as we hereby do. Accordingly, we hereby strike out this appeal with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY FEBRUARY, 2023.

DK MUSINGA (P)

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JUDGE OF APPEAL

DR KI LAIBUTA

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JUDGE OF APPEAL

GW NGENYE-MACHARIA



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

